

Ronald D. Foreman (SBN 61148)
FOREMAN & BRASSO
930 Montgomery Street, Suite 600
San Francisco, CA 94133
Telephone: (415) 433-3475
Facsimile: (415) 781-8030
Email: foremanandbrasso@foremanandbrasso.com

Attorneys for Defendant
MICHAEL T. BLATT.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

LIBERTY MUTUAL INSURANCE
COMPANY,

Plaintiff,

v.

MICHAEL T. BLATT,

Defendant.

Case No. C 06 2022 SC

**DEFENDANT MICHAEL T.
BLATT'S TRIAL BRIEF**

Date: January 28, 2008

Time: 9:30 a.m.

Courtroom: 1

Hon. Samuel Conti, Sr.

Trial Date: January 28, 2008

Defendant MICHAEL T. BLATT ("Blatt") submits the following trial
brief.

INTRODUCTION

This is an insurance coverage action that arises out of Liberty Mutual's
defense of defendant Michael Blatt in an underlying construction defect
action.

The underlying action was *Gabbert v. Lincoln, Marin County Superior
Court, Case Number CV 020477*. In this action, Liberty Mutual is seeking
reimbursement of attorneys fees paid to plaintiffs' counsel in the underlying
action (\$286,667.40); reimbursement of costs of suit paid to plaintiff

1 (\$13,634.85); fees and costs paid to Blatt's defense attorneys in the underlying
 2 litigation (\$198,345.11) and for prejudgment interest. To that end, Liberty
 3 Mutual filed a motion for summary adjudication decided by this Court on
 4 October 26, 2007. (**Exhibit 1** is the Court's October 26, 2007 Order on the
 5 Motion for Summary Judgment).

6 **STATEMENT OF FACTS**

7 **A. The Underlying Litigation**

8 In September of 1998, James Gabbert and Michael Lincoln contracted
 9 with Michael and Catherine Blatt to purchase two units in Sausalito that were
 10 under construction.

11 Escrow closed in March of 1999. When Gabbert and Lincoln began
 12 remodeling their condominiums, they claimed they discovered construction
 13 defects and deficiencies which included water intrusion from the hillside.

14 On January 29, 2002, Gabbert and Lincoln filed a complaint against
 15 Blatt for breach of contract, negligence, fraud, negligent misrepresentation,
 16 concealment of material facts and breach of implied warranty. The complaint
 17 alleged various construction defects, including water intrusion.¹ The gravamen
 18 of the complaint was construction defects (including water intrusion) and *all*
 19 the claims were based on these operative facts involving property damage.

20 Blatt contracted with Schnabel Foundation on June 6, 1997 to install a
 21

22
 23 ¹"On or about September 1998, defendants negligently, and with lack of
 24 ordinary care, constructed houses for plaintiff such that, among other things, water
 25 penetrated the Property, the Property failed to comply with applicable building and
 26 safety codes, the Property was not properly ventilated, and the Property was not
 27 structurally sound." (Complaint, para. 17). These allegations were incorporated into
 28 every cause of action. (See Complaint, para. 22 (Fraud), para. 32 (Negligent
 Misrepresentation), para. 44 (Suppression and Concealment of Facts) and para. 49
 (Breach of Implied Warranty. Allegations of insufficient drainage were stated in the
 first cause of action for breach of contract. (Complaint, para. 11).

1 soil nail concrete wall to stabilize the hillside behind the units under
2 construction for Gabbert and Lincoln. Liberty Mutual issued a general liability
3 policy insuring Schnabel. Blatt was an additional-named insured on the policy.

4 In their lawsuit, Gabbert and Lincoln claimed that they sustained water
5 build up behind the masonry block wall built in front of the soil nail wall
6 because proper drainage was not installed. The allegations were that the
7 Schnabel design and construction of the soil nail wall failed to take into
8 account the amount of water which the hillside would accumulate and that the
9 drainage was inadequate for the flow. Another claim was that the soil nail wall
10 should have had, but did not have, a moisture protection material applied to
11 the exterior of the wall. Gabbert and Lincoln tested the wall and found no
12 evidence of a moisture protection material. It was alleged that Schanbel was
13 responsible for applying a moisture barrier.

14 On April 30, 2002, Blatt cross-complained against Schnabel for its
15 failure to provide adequate retaining walls and drainage, alleging that this
16 failure caused plaintiffs' damages.

17 On March 21, 2002, Blatt tendered his defense to Liberty Mutual as an
18 additional insured under the Schnabel policy. Liberty accepted the defense
19 subject to a September 4, 2002 reservation of rights letter. This letter stated
20 that Liberty reserves the right to "seek allocation and/or reimbursement of any
21 defense costs not associated with covered claims." The letter also stated: "We
22 have reviewed the subcontract and the certificates of insurance that you
23 provided, and because the correspondence in this case can be read as alleging
24 'property damage' to which our policy would potentially apply, we will agree
25 to share in the defense of Michael Blatt...". Liberty Mutual agreed to provide a
26 defense to Blatt.

27 Throughout the trial, Blatt proceeded on an integrated defense on all
28 claims that stemmed from construction defect and deficiency allegations,

1 including water intrusion. In fact, Gabbert and Lincoln's construction defect
2 expert, Paul Weir, was critical of Schnabel and testified that, in his opinion,
3 Schnabel was responsible for failing to provide a vapor barrier and adequate
4 drainage. He testified that there was water migration through the concrete
5 walls with additional water collecting behind the wall. Weir also testified that
6 there should have been a drainage system and weather protection elements at
7 the face of the concrete. He testified that he had some criticisms of Schnabel,
8 the soil-nail wall designer and installer. One concern was over the detail
9 Schnabel provided as the way to hook up the drain. Weir also criticized the
10 lack of drainage above the shotcrete wall built by Schnabel. This caused
11 significant water migrating through the shotcrete wall. Blatt could have been
12 held liable under this theory against Schnabel.

13 On February 27, 2004, the jury returned a verdict against Blatt on the
14 negligence and breach of contract claim. For the breach of contract claim, the
15 jury only awarded Gabbert and Lincoln damages in the amount of \$1.00. The
16 jury did not find fraud or negligent misrepresentation. Schnabel obtained a
17 defense verdict in the underlying action. Judgment was entered on February
18 27, 2004.

19 **B. Post Trial Motions and the Amended Judgment**

20 On June 30, 2004, the Court amended the judgment and awarded
21 plaintiffs Gabbert and Lincoln \$286,669 in attorneys fees and \$13,634.85 in
22 costs against Blatt.

23 On August 31, 2004, Blatt paid the judgment of \$144,428.60 to Gabbert
24 and Lincoln. Liberty Mutual expressly stated it would not indemnify Blatt or
25 pay Gabbert and Lincoln.

26 In September of 2004, Liberty Mutual paid Gabbert and Lincoln's
27 attorneys fees (\$286,667.40) and costs (\$13,634.85). At that time, Liberty
28 Mutual did not tell Blatt that it would seek reimbursement of these amounts or

1 that Blatt would have to repay these amounts to Liberty Mutual. These
2 payments were made without notice to Blatt that Liberty Mutual would seek
3 reimbursement of these amounts.

4 It is important to note that Blatt's time to file an appeal (60 days from
5 judgment) ran on August 31, 2004. In fact, Blatt's appellate rights were placed
6 in the hands of counsel for Liberty Mutual. In a September 7, 2004 letter,
7 counsel for Blatt wrote: "The intent of the appeal was to protect Mike Blatt's
8 legal rights and give Liberty Mutual the opportunity to negotiate a fee payment
9 deal or pursue the appeal." Liberty Mutual did neither and simply paid the full
10 amounts of the judgment. Had Blatt been informed by Liberty Mutual that it
11 was going to seek reimbursement of these sums, Blatt could have insisted that
12 Liberty Mutual appeal the verdict and/or negotiate to reduce the amount of
13 attorneys fees and costs in exchange for a waiver of appeal. Instead, Liberty
14 Mutual stepped in and paid 100% of the judgment, never informing Blatt it
15 would seek reimbursement from him three years later for the full amount plus
16 prejudgment interest. If Liberty Mutual knew post-verdict, *as it now contends*,
17 that it had no obligation to pay Blatt's attorneys fees and plaintiffs' attorneys
18 fees and costs, it should have immediately informed Blatt of this prior to
19 paying these amounts so that Blatt could have asserted legal challenges to the
20 fees and costs.

21 Also, if Liberty Mutual knew that it had no obligation to pay the
22 attorneys fees and costs post-verdict (February 27, 2004—the point in time
23 Liberty Mutual states it knew there was no coverage), why did it do so? Why
24 did it then wait two years to file this lawsuit for reimbursement? Liberty
25 Mutual admits that when Schnabel was exonerated by the jury, it declined to
26 pay any indemnity on behalf of Blatt. Why didn't it decline to pay the
27 plaintiffs' attorneys fees and costs at the same time?

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B. The Liberty Mutual Policy

It is undisputed that Blatt was an additional named insured under the Liberty Mutual policy. Liberty defended Blatt under the terms of an endorsement which provided that Blatt was an additional insured under the Liberty policy.

C. This Action.

On March 16, 2006, almost two years post-judgment, Liberty Mutual, to Blatt's surprise, filed the instant action to recover attorneys fees, costs and interest on the amounts it paid on the June 2004 judgment. The complaint for Equitable Indemnity and Declaratory Relief alleges:

"23. The claims against defendant in the Gabbert/Lincoln complaint were for breach of contract, negligence, fraud, negligent misrepresentation, concealment of material facts and breach of implied warranty. Some or all of these causes of action constitute claims for which there never was any potential for coverage and therefore, no duty to defend, Liberty is entitled to recover any and all defense fees and costs attributable thereto."

"29. An actual controversy exists between Liberty, on the one hand, and Blatt, on the other, concerning who is obligated to pay attorneys' fees and costs awarded to Gabbert/Lincoln in the underlying action. Liberty contends that it had no duty to pay the costs awarded to the underlying it's plaintiffs [sic] under the policy and, therefore, Liberty is entitled to recover, pursuant to Buss v. Superior Ct. 16 Cal.4th 35 (1997), the monies it expended on Blatt's behalf. Liberty is informed and believes that Blatt contents that Liberty is obligated to pay such monies under the terms of the Liberty policy. Liberty seeks a judicial determination of its rights and duties under the Policy and its rights with respect to the recovery of Liberty's payments from Blatt." (See Complaint)

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D. Liberty Mutual's Motion for Summary Adjudication

On summary adjudication, Liberty Mutual argued that because a jury found Schnabel, the original insured, not liable, Liberty Mutual never had a duty to defend Blatt and thus may recover the costs of defense of Blatt. However, as this Court pointed out, the insurer's duty to defend arises whenever the third party complaint or the facts suggest the possibility of covered claims. In the underlying case, the buyers alleged water intrusion from the hillside and insufficient drainage.

After a jury trial, Blatt was found liable under negligence and breach of contract claims, both of which included allegations of property damage. On summary adjudication, this Court held that the allegations in the breach of contract claim created the potential for coverage under the policy, which is all that is required to trigger a duty to defend. (Ex. 1, 7:9-8:9). This Court held, as a matter of law, "the Buyers' cause of action for breach of contract constituted a claim for physical injury to tangible property and therefore was a claim for property damage." (Ex. 1, 8:6-9). The Court found the same for the negligence claim, as a matter of law. (Ex. 1, 9:1-4).

On summary adjudication, the Court also dispensed with Liberty Mutual's assertion that the jury verdict in the underlying case established as a matter of law that there was never potential coverage for the claims against Blatt. (Ex. 1, 9:5-8). Liberty Mutual's duty to defend was triggered because of the disputed factual issues. (Ex. 1, 9:22-10:5).

In conclusion, the Court found, as a matter of law, that Gabbert and Lincoln's claim for breach of contract and negligence constituted claims that were potentially covered by the Liberty Mutual insurance policy for property damage and that Liberty Mutual's duty to defend Blatt was triggered. According to this Court, Liberty Mutual cannot seek reimbursement for defense funds that accrued before the jury verdict. (Ex. 1, 10:20-26).

Once the jury returned a finding of no liability for Schnabel, Liberty Mutual's duty to defend Blatt was extinguished. Therefore, Liberty Mutual claims attorneys fees and costs generated after the jury verdict in the total amount of \$10,617.69.

ISSUES TO BE DECIDED AT TRIAL

After summary adjudication, this Court identified three issues that are left for determination:

- (1) Whether any attorneys' fees and/or costs were generated, in the defense of Blatt, after the jury verdict;
- (2) Whether Liberty Mutual paid any of these fees and/or costs;
- (3) The amount, if any of these fees and costs.

The Court has defined the scope of the trial with these three questions. Therefore, Blatt moves, *in limine*, for an order excluding any evidence that does not relate to these three questions as irrelevant. Fed. R. Evid. 402.

The response to these questions are contained in the Stipulated Facts². Of the \$198,344.88 in direct defense expenses, \$23,045.71 was incurred on behalf of Blatt after the jury verdict in the underlying action. (Stipulated Fact **No. 1**). Of this amount, \$8,755.19 was paid by Liberty Mutual after the verdict. (Stipulated Fact **No. 2**). Of the \$300,303.85 fee and cost award, \$1,582.50 was incurred by counsel for Gabbert and Lincoln after the jury verdict in the underlying action. (Stipulated Fact **No. 3**). This amount was paid by Liberty Mutual to Gabbert and Lincoln. Therefore, the total amount due is easily ascertained from the stipulated facts: \$10,617.69.

In defense of the complaint, Blatt asserted various Affirmative Defenses. The defenses are a bar to the payment of the amount claimed by

²At the time of filing this Trial Brief, the parties were still negotiating some of the language for the Stipulated Facts. It is anticipated that the language contest will be resolved by Trial and that Fact Nos. 1, 2 and 3 are accurately represented.

1 Liberty Mutual. Blatt alleges that Liberty Mutual is estopped and has waived
2 its right to collection of the \$10,617.69 by paying this amount, not giving
3 appropriate notice to Blatt and not seeking reimbursement for over 2 years.
4 Liberty Mutual's claims are barred by the doctrines of estoppel and waiver
5 (Blatt's Seventh Affirmative Defense), and unclean hands defense (Blatt's
6 Thirteenth Affirmative Defense).³ The doctrine of equitable estoppel and
7 waiver provide that a party who, by the party's own statement or conduct,
8 intentionally and deliberately led another to believe a particular thing to be
9 true and to act on that belief, may not, in litigation arising out of that statement
10 or conduct, contradict it. *Hair v. State of California*, 2 Cal. App. 4th 321, 328-
11 329 (1991).

12 After the verdict, Liberty Mutual paid Gabbert and Lincoln's judgment
13 for attorney's fees and costs, in full. Liberty Mutual failed to notify Blatt at the
14 time of payment, or up to the time of filing this lawsuit, that it would seek
15 reimbursement of the amounts paid. Had Blatt been given notice, he could
16 have pursued the appeal of the judgment or negotiate a discount in the
17 payment to Gabbert and Lincoln. Liberty Mutual prejudiced Blatt's legal rights
18 and remedies by paying plaintiffs 100% of the fees and costs and then, three
19 years later, suing Blatt for reimbursement, along with years of interest. The
20 court cannot countenance such tactics. Liberty Mutual's delay and failure to
21 promptly notify Blatt of its decision to seek reimbursement clearly prejudiced
22 Blatt's legal rights and remedies.

23 For these reasons, Liberty Mutual should take nothing by way of its
24 complaint and this case should be dismissed.

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26
27 ³A party who has acted wrongfully, dishonestly, or unfairly in bringing an
28 action to court may be precluded from obtaining equitable relief. *Seymour v. Cariker*,
220 Cal. App. 2d 300, 305 (1963).

CONCLUSION

Based on the foregoing, defendant Blatt requests a defense verdict and dismissal of this case.

DATED: January 23, 2008

FOREMAN & BRASSO

By: /s/
Ronald D. Foreman
Attorneys for Defendant
Michael T. Blatt